IN THE SUPREME COURT OF FLORIDA

ETHERIA VERDEL JACKSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 69,197

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, ETHERIA VERDEL JACKSON, was the defendant in the trial court and will be referred to in this brief as appellant or by his proper name.

The record on appeal, consisting of four volumes of pleadings, sequentially numbered at the bottom of each page, will be referred to as "R" followed by the appropriate page number in parenthesis. The transcript of proceedings below is contained in twenty volumes, sequentially numbered at the top of each page, and will be referred to as "T" followed by the appropriate page number.

II STATEMENT OF THE CASE

Appellant was indicted by the Grand Jurors of Duval County for the first degree murder of Linton A. Moody on December 3, 1985 (R.8-9).

Appellant was arraigned on the charge on December 23, 1985, and the Public Defender was appointed to represent him (R.10; T.1565-1567). On January 9, 1986, appellant appeared in court with his appointed counsel, Alan Chipperfield, to discuss a potential conflict or appearance of impropriety in the case. Counsel advised the court that Lynn Fowler, the investigator who conducted the initial interview of Mr. Jackson for the Public Defender's Office, was dating Richard Mullaney, the prosecutor assigned to the case. Mr. Mullaney represented to the court that he had never discussed the case with the defense investigator and, in fact, only learned that Ms. Fowler was involved in the case through Mr. Chipperfield. The court, satisfied that there had been no breach of confidentiality, instructed the prosecutor and Ms. Fowler not to discuss the case with each other and ordered both parties to file affidavits stating that at no time had they discussed the matter (T.1539-1545). The affidavits were filed pursuant to the court's instructions (R.36-37, 38).

Appellant's pretrial motion to suppress statements (R.84-85) was denied after a hearing on May 14, 1986 (R.408; T.25-109). Also at the hearing, the trial court considered and denied appellant's motion in limine concerning penalty (R.125-127, 412; T.141-146). The court took under advisement appellant's motion in limine concerning his parole status (R.243-244; T.147-151).

At the motion hearing on May 19, 1986, the trial court considered three other motions in limine filed by appellant, and denied each one: motion to exclude certain oral statements of appellant; motion to prohibit impeachment of appellant

by prior criminal convictions, and motion to prohibit evidence referring to appellant's stay in prison (R.420-421, 422-423, 434, 427, 437; T.159-165, 168-172, 173-176).

Appellant proceeded to jury trial before Circuit Judge L. Page Haddock on June 17-20, 1986. At the conclusion of the trial, the jury found appellant guilty of first degree murder as charged (R.646; T.1207).

Following an advisory penalty hearing on July 11, 1986, the jury recommended by a vote of seven to five that the trial court impose the death sentence (R.704; T.1482-1483). Appellant was adjudicated guilty of murder in the first degree, and in accordance with the jury recommendation, the court sentenced appellant to death (R.733-738; T.1531-1534).

Appellant's amended motion for new trial (R.677-688) and motion for new penalty phase hearing (R.705-710) were heard on August 8, 1986, and denied by written order (R.731, 732; T.1496-1506).

Notice of appeal was timely filed (R.742), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal. This appeal follows.

III STATEMENT OF THE FACTS

Linton Moody and his brother Wendall owned and operated a retail furniture business in Jacksonville for 41 years. Since beginning the business in 1947, Linton Moody would cash a bank check every month and then cash customers' welfare and social security checks to collect their monthly installment payments. When making collections, Mr. Moody routinely called his brother at 10:00 in the morning or came in at 11:00 a.m. (T.493-496).

On November 29, 1985, Linton cashed a $4,000 check to collect the December payments. On Monday, December 2, Mr.Moody came in to the store at 10:30 a.m. and stayed there until 1:00 or 2:00 p.m. When Linton did not check in at the usual time on Tuesday, December 3, Wendall Moody called his brother's home, but did not receive an answer. Later that afternoon Mr. Moody filed a missing person report (T.501-504).

On December 5, 1985, Officer Raymond Godbee investigated a reported abandoned car at 3491 Brentwood Avenue. A carpet was folded up in the back section of the 1983 Chevrolet station wagon. Godbee opened the tailgate of the car, partially unfolded the carpet and discovered the body of Linton Moody (T.505-512, 549).

The vehicle was impounded. At the crime lab, the carpet was removed from the vehicle and unrolled (T.574-515, 541). The victim's brown briefcase was removed from under the backseat of the station wagon (T.553-554). Appellant's fingerprints were identified on a red calling card box found inside Mr. Moody's briefcase (T.950, 952-963).

Linda Riley and her two children, Kalimah and Letheria, lived at 1770 Payne Street. Letheria, age 2, is also appellant's daughter. In December, 1985, Ms. Riley owed Linton Moody $39.95 for a washing machine. Mr. Moody would come to

her home each month and cash her AFDC check, deducting the amount of her monthly payment on the washing machine. Mr. Moody had collected seven or eight payments. Appellant was present on a few occasions when Mr. Moody had cashed checks for her. On December 2, 1985, Mr. Moody came by Linda's house and left his business card in the door, indicating that he would return the next day. He returned between 8:30 and 9:00 a.m. on December 3, 1985. Linda answered the door and invited Mr. Moody inside while she got a sweater to go to the mailbox for her welfare check. When she went upstairs for her sweater, appellant asked who was at the door and Linda told him "the furniture man" (T.567-572).

After getting her check from the mailbox, Linda saw Etheria downstairs talking to Mr. Moody. Etheria had a cast on his right arm. Linda endorsed her check and gave it to her creditor. He gave her $200 and a receipt. At that point, Etheria walked behind Mr. Moody, grabbed him and pointed a knife at his neck. Appellant forced Moody to the ground on his stomach. Over appellant's objections, Linda testified that Mr. Moody complained that he had asthma and was having trouble breathing. Appellant then told Linda to check the man's pockets and Linda removed his wallet and keys. Linda claimed that appellant took all the money but gave her the check Mr. Moody had cashed (T.572-576).

Linda tied Mr. Moody's hands at appellant's instructions. Mr. Moody asked appellant to have mercy. Letheria, Linda's and appellant's daughter, came downstairs and Linda carried her to the top of the stairs. When Linda came back into the room, appellant was choking Linton Moody with a belt. Moody was unconscious when appellant stopped, but when he started regaining consciousness, appellant beat Mr. Moody in the face with his cast. Linda went into the kitchen to fix breakfast and heard thumping sounds. She looked into the other room and saw appellant straddling Mr. Moody, stabbing him in the chest (T.577-580).

Linda and Etheria rolled the body up in the carpet. Linda drove Mr. Moody's car to the back of her house. She took a gun out of the glove compartment and hid it in her washing machine. Then appellant, Linda and a passerby loaded the carpet in the car and appellant drove off (T.587-588).

Later that afternoon Linda cashed her AFDC check at Surfside Furniture Store and paid her monthly $83 bill. The following day, Wednesday, Ms. Riley took her children to their babysitter, Mrs. Harris, and paid her $40. She and appellant then went to Davis Furniture Company to purchase a new rug for the living room. Appellant used the name Anthony Freeman when he ordered the rug. Randy Bowman identified a photograph of Mr. Jackson as the man who purchased the carpet and recalled that he had a cast on his arm. Linda paid Mr. Bowman $300 cash for the new carpet (T.597-601, 724-729, 754-755, 858-860). Linda and Etheria made other purchases at the Gateway Shopping Center that Wednesday. They used Mr. Moody's money and the remaining cash from Linda's AFDC check (T.601-602).

On Thursday, December 5, Linda went to the home of an associate, Renee, to talk about the murder. That afternoon Linda and Etheria rented a car from Tillman Auto Rental. After going to the car wash, Ms. Riley dropped appellant off at a barbershop, drove to the Sheraton Hotel to get a paycheck, picked up Renee and went to the police to report the crime (T.602-605).

After reporting the crime to the police, Ms. Riley and her children stayed with Renee for about a week. She then moved in with Jerosa Jackson, appellant's mother, after appellant's arrest. She talked to Etheria on the telephone and took clothing and children to the jail. She left Mrs. Jackson's home after appellant was indicted for murder because she felt uncomfortable there (T.609-611).

Linda Riley denied having an affair with Linton Moody (T.588). Appellant objected when the prosecutor asked Ms. Riley when appellant got out of prison; the objection was overruled and appellant's motion for mistrial denied (T.589-91). Ms. Riley testified that appellant was released on December 4, 1984, one year before the murder of Mr. Moody. Linda did not have any relationship with Mr. Moody prior to December, 1984 (T.591-592).

Linda testified on direct examination that she failed to appear for a deposition in April when she was visiting a relative. When she returned to Jacksonville, Detective Warren told her she could be charged as a hostile witness for failure to appear. She was never threatened with arrest for the murder of Linton Moody (T.606-608).

On cross-examination Ms. Riley testified that on the morning of the murder, Mr. Jackson was acting confused and panicky. He was talking to himself as if he didn't know what to do and had not planned anything (T.632). Linda took some money from Mr. Moody's pockets but she gave it to Etheria. She tied Mr. Moody with a belt that was laying on the floor, gaggd him with a rag doll, and used her own scarf to tie around his mouth. She later threw the rag doll in a dumpster, along with Mr. Moody's watch, wallet, keys, receipt books and the belt Linda used to choke him. Although she left the living room and went into the kitchen to get something for her children to eat, she never went outside to call for help, even though her neighbors were home (T.633-636, 639-640, 643-644). She helped Etheria move furniture off the carpet before rolling up the body in the rug. She could not remember what she did with the knives used to stab Mr. Moody (T.638, 640-641).

Ms. Riley further stated on cross-examination that she drove the rental car to the police station when she reported the murder, but never mentioned

to Detective Warren that the rental car was outside. Detective Warren drove Linda and Renee home that day. Linda returned the rental car to Tillman Auto after four days, having driven 197 miles. The rental agreement allowed 200 miles. Linda received a $95.21 refund on the rental deposit (T.627-628, 654-656, 739-749).

Although she paid bills with her $240 welfare check, Linda told Detective Warren that appellant took that money from her (T.628-629). Ms. Riley had been fired from her job at the Sheraton before the murder, and her only income was her last paycheck and monthly AFDC payment. Besides owing Mr. Moody $39.95 in December, she owed $29 a month to Newsom Furniture, $83 a month to Surfside Furniture, $11 in rent, and over $1,000 in student loans. After the murder she paid Newsom Furniture $90 for three months, $83 to Surfside Furniture, $40 to Mrs. Harris, $349 for the new carpet from Davis Furniture, as well as purchasing a new skirt outfit, pair of boots, designer stockings, and renting the car (T.645-653). Although Linda said she did not know what happened to the rest of Mr. Moody's money (T.657), she and Renee went shopping again at the Argyle Shopping Center on the Saturday after going to the police (T.660).

Ms. Riley had Army basic training when she joined the National Guard in 1979 (T.661, 696). The court sustained the state's objection when defense counsel asked Linda whether she was seeing anyone else while Etheria was in jail (T.665-668). On proffer outside the presence of the jury, Ms. Riley stated she was seeing someone while appellant was in jail (T.668-669). The court rejected appellant's argument that the proffered cross-examination was proper to show the witness' bias (T.669). Appellant also proffered testimony that Linda got pregnant by someone else while appellant was in jail, which testimony was excluded (T.672-673).

Ms. Riley went into hiding and failed to appear when the case was first set for trial. She surfaced after a friend was arrested for collecting Linda's food

stamps. She went to the Prison Farm and her children were taken into custody pending the trial. She was never charged with contempt for failing to appear or with food stamp fraud (T.683-684). After one week at the Prison Farm, she moved to the Hilton Hotel where she was staying at the time of the trial (T.687-688).

On December 3, 1985, around noon, Edward Doldron and a friend, David Thomas, were driving north on David Street just past the railroad tracks. David saw an acquaintance and motioned Doldron to stop. A man with a cast on his arm came up to the car and asked where he could find cocaine. Doldron identified appellant as the man with the cast. Appellant offered to buy Doldron gas and told him, "I just hit a sweet lick" (T.709-710, 712). Appellant took four or five stacks of $20 bills out of his front pockets. When they went to buy cocaine, Doldron saw stacks of folded $50 bills in appellant's back pockets. The three men returned to the house on Payne Street and stayed in the kitchen to use cocaine. Doldron did not see any carpet in the living room (T.713-715).

Doldron was a mechanic and appellant offered to pay him to fix his car. Etheria paid him cash for purchasing the parts. When Doldron returned the car, he learned that appellant was in jail, and he went to the Sheriff's Office to find out about getting paid for repairing the car. He spoke with Detective Warren and picked appellant's photograph out of a photospread (T.717-721, 752-753).

Appellant never told Doldron that he killed or hurt anyone. Doldron never saw any blood on appellant's shoes, clothes or cast. He called the Sheriff's office because he heard there was a reward and he wanted either a reward or to get paid for repairing the car (T.721, 723).

Freddie Johnson lives with his mother at 1650 Myrtle Avenue. Johnson met Etheria Jackson and Etheria's brother in his front yard the weekend after Mr.

Moody was murdered. Appellant's brother asked Johnson to tell the police that Etheria was at Johnson's home the previous Monday night watching a football game and that he stayed all night. Johnson testified that appellant was not with him that night and, in fact, had never been to his house to watch television (T.759, 762-746, 767).

On Sunday night, December 8, appellant went home to talk to his mother. She wanted to know what happened because she thought Linda and he were in jail. Appellant told her three versions of how the murder took place, but Mrs. Jackson could not recall the order of each version appellant told her. After refreshing her memory with her sworn statement (R.751-787), Mrs. Jackson told the jury that appellant said he was talking to Mr. Moody about the cast on his arm when Linda and Lee hit Mr. Moody in the head and killed him; Lee and Linda rolled the body up in the carpet; Linda drove the car to the back door and appellant drove off with the body in the car. The three of them were going to split the money. Appellant asked his mother how the story sounded, and then revised the story, telling her that he was upstairs, Linda called him and when he came downstairs Mr. Moody was dead. Linda and Mr. Moody were having an affair, and one of them wanted out of the relationship; they got into a fight and she killed him. Linda took the money and gave some to Etheria to pay some bills. Lastly, Etheria told his mother that the murder was committed before he got home and that Linda rolled up the body in the carpet. Linda got the money but gave some to appellant. He paid bills and they went shopping and Linda rented a car (T.769-783, 789-794, 799-800).

Mrs. Jackson stated on cross-examination that her son was upset when he was talking to her and ashamed that he got involved by driving the car. He maintained that Linda had killed Mr. Moody over a dispute about their affair.

Etheria did not know what was going on between Linda Riley and Mr. Moody aside from what Linda told him. Appellant admitted helping roll-up the body as best as he could with the cast on his arm and admitted driving the car and spending some of Mr. Moody's money. Appellant did not have any money on him when he came to his mother's house (T.803-808).

Detective J. D. Warren interviewed appellant at the police station on December 9, 1985. Appellant was advised of his rights and signed a rights form. According to Warren, appellant was nervous, but did not appear intoxicated. When the officer told Mr. Jackson that he was under arrest for the murder of Linton Moody, appellant responded that Linda Riley committed the murder and he was not present when it occurred. He said he spent the night at Freddie's watching football and when he got to Linda's apartment at 9:00 a.m., the body was already rolled up in the carpet. Linda had a large sum of money in her pocket and she admitted that she killed Mr. Moody. She told Etheria that she was behind him and she stabbed him with a knife in his chest. Appellant said that Linda and Linton Moody had an affair while he [appellant] was in prison and Mr. Moody kept messing with Linda. Etheria wanted to call the police, but Linda wanted to dispose of the body (T.814-818, 824-828, 830-831).

Linda and Etheria put the carpet in the car with the help of a young boy. At first appellant said Linda drove off with the body, but he later told Detective Warren that he and Linda drove the car to the Brentwood project, started walking back together and then split up. He said they took the children to Linda's babysitter, Mrs. Harris. Linda and he spent some of the money shopping. He told the detective he purchased a new carpet at Davis Furniture using the name Anthony Freeman. He used his own name at Tillman Auto. On the night of December 5, Etheria was walking up Payne Street toward Linda's apartment when he saw the police; he turned around and walked away (T.828-832).

Detective Warren obtained a search warrant for appellant's cast and he met appellant at University Hospital later that day. At the hospital Etheria told Detective Warren that after the case was over they would be friends; that Warren had him [appellant] "like a hawk" and "I had the opportunity." Warren said he still did and appellant responded, "Not really, I have to go with what I told you, I can't change my story now" (T.833-835). He continued to tell the officer that he could beat him and would catch him on the rebound (T.835). Appellant also said he had washed the cast because it was dirty (T.836).

Dr. Peter Lipkovic performed the autopsy on Linton Moody. Mr. Moody was 64 years old and showed a moderate amount of heart disease and emphysema at the time of death. The autopsy revealed numerous bruises on the head, face and neck, a shallow slash wound on the neck, a rug burn on the left elbow and bruises on both knee caps. The victim also sustained seven deep stab wounds in the upper left chest area, causing massive internal bleeding and death. There was no blood on the lower extremities, indicating that the victim was prone at the time the injuries were inflicted. The bruises on the neck were consistent with strangulation by either a forearm or cast, or possibly a broad belt (T.877, 888-900, 904-913).

With the aid of a diagram of the human torso, Dr. Lipkovic described the angle and direction of the stab wounds and opined that the stabs were inflicted by someone using the left hand, whether the assailant was straddling the victim or standing behind him. The chest wounds were all grouped in a relatively small area, parallel to each other, suggesting that they were inflicted within a relatively short period of time and without any significant change in position between the victim and assailant (T.918-924).

Dr. Lipkovic admitted on cross-examination that the stab wounds could have been made with the right hand depending on how the knife was held and the

position of the assailant. He could not determine from the wounds if one or two knives were used. There was no evidence that a knife had broken. A woman could have caused the injuries (T.924-930).

After presenting its evidence, the stated rested (T.964). Appellant's motion for judgment of acquittal and motion for mistrial were denied (T.964-967).

The first defense witness was Lethenia Meadows, a crime lab analyst at the Florida Department of Law Enforcement. Having been qualified as an expert in serology, Ms. Meadows testified that she examined appellant's cast for the presence of blood stains at the request of Detective Warren. The tests were negative (T.969-973).

Leon Campbell was qualified as an expert in "street slang" (T.975-982) and testified that on the streets the phrase "sweet lick" means easy money (T.982-983). The phrase does not refer to murder or a crime of violence or the manner in which the money was obtained (T.983-984).

On December 5, 1985, Officer G. J. Gallon talked to Linda Riley about the murder. Linda told the officer that when Mr. Moody came to her house, she left the room to get her check, and when she returned Mr. Jackson and Mr. Moody were having a conversation in the living room (T.991-992, 995-996). Appellant sought to impeach the witness on the grounds that he proved to be adverse by giving testimony inconsistent with his deposition testimony and inconsistent with what he told defense counsel two hours earlier in his office, and his testimony buttressd the state's case and was harmful to the defense. The court overruled the state's objections and declared Officer Gallon an adverse witness (T.996-1003). Officer Gallon then admitted stating in his deposition that Linda said Etheria was choking Mr. Moody when she returned to the room after getting her check (T.1003-1005). The court sustained the state's objection when

appellant's counsel inquired what the officer told counsel two hours earlier in his office (T.1005-1007).

The final defense witness was J. D. Warren, who testified that he talked to Linda Riley on December 5, 1985, after the recovery of Mr. Moody's body was reported on television. Ms. Riley told the officer that her children were upstairs before and during the incident, but one child tried to come downstairs during the incident, she went to the steps and told the child to go back upstairs. Ms. Riley gave the detective a loaded automatic pistol and said Etheria took it out of Mr. Moody's glove compartment. She also said that Mr. Jackson put the gag in Mr. Moody's mouth and threw the knife and belt in the trash dumpster (T.1011-1014).

The defense rested (T.1029).

On rebuttal, Detective Ralph Moneyhun was declared an expert in street slang and testified that the term sweet lick is usually referred to by someone involved in a robbery as a great quantity of money or drugs (T.1030-1034).

Appellant's motion for judgment of acquittal was renewed and denied (T.1041).

Following the charge conference (T.1044-1071), closing arguments (T.1084-1180) and instructions to the jury (T.1183-1204), the jury retired to deliberate and returned its verdict finding appellant guilty as charged (R.646; T.1207).

Prior to the commencement of the penalty phase on July 11, 1986, appellant renewed his pre-trial motion concerning the penalty, requesting that the jury be advised that under a life sentence for first degree murder, there is no possibility of parole. The motion was denied (T.125-126, 659, 667; T.1215-1216). Appellant also filed a notice of waiving the mitigating circumstance under Section 921.141

(6)(a), Florida Statutes, and moved to prohibit the state from introducing evidence of appellant's prior criminal activity, which was granted (R.100, 666; T.1216-1218, 1224). The court denied appellant's motion in limine and offer to stipulate that he was on parole, after hearing arguments from counsel for appellant and the state (T.694-695, 696; T.1231-1239).

The state presented four additional witnesses at the penalty hearing. Marion Wainwright, the records custodian of the circuit court, identified the judgments and sentences in Circuit Court Case Nos. 79-7229, in which appellant was convicted of armed robbery, and 82-8621, in which he was convicted of escape (T.1244-1249, 1253). Fingerprint examiner John Wilson testified that appellant was the defendant in both cases (T.1259-1262).

Bobbie Glover is the admission and release administrator in the Department of Corrections. She identified copies of appellant's commitment papers and certificate of parole, and her affidavit attesting to appellant's sentences. Over appellant's objections, the affidavit was admitted into evidence and read to the jury. It indicated that appellant was sentenced to a term of 15 years for the armed robbery conviction in Case No. 79-7229; the sentence was suspended after four years and appellant placed on parole; appellant escaped from the Duval County Community Correctional Center on September 21, 1982, was convicted of escape in Case No. 82-8621 and sentenced to three years, to run consecutive to the sentence in Case No. 79-7229; appellant was granted parole for both escape and armed robbery on December 4, 1984, while he was serving a cumulative seven year sentence (T.1263-1274).

In December, 1985, appellant was on parole under the supervision of Charleston Holt (T.1279-1280).

The state rested (T.1291).

The first defense witness was W. Gregg McCaulie. Mr. McCaulie represented appellant in 1979-1980 on the armed robbery charge. Appellant pled guilty and agreed to be a state witness against his co-defendant (T.1291-1293).

Appellant's sister, Ersel Lorine Collier, testified that she and Etheria grew up in the same household. There are five children in the family, two girls and three boys. Of her three brothers, Ersel is closest to appellant. He gets along well with her children as well as his own. Appellant is talented, intelligent and was always a good student. Ms. Collier loves her brother and said she would visit him in prison (T.1310-1314).

Vanessa Jackson dated appellant and is the mother of appellant's two children, Kyron, age 8, and Vernel, age 6. Although appellant was living with Linda Riley, he continued to have a close relationship, like brother and sister, with Vanessa. Appellant would visit his children before he was arrested. Since he had been in jail, he would call and write Vanessa and the children. He wrote to them every other day when he was in prison. He always remembered birthdays, holidays and special occasions with cards he made. The witness identified photographs depicting his mother, children, Vanessa and a friend when they came to visit him in Tallahassee in 1983 (T.1315-1321, 1330-1332).

Jerosa Jackson testified that her son Etheria was always a good child, respectful and helpful. He helped care for his oldest sister, Toyetta, who had polio, and his father, who suffered from crippling arthritis and a heart condition. He would feed and bathe Toyetta and take her on excursions in her wheelchair. Etheria was very good to his four children and nieces and nephews. Mrs. Jackson regularly took the children to visit their father in prison (T.1334-1340).

Appellant changed in the month before Mr. Moody's murder. Mrs. Jackson assumed that her son was under the influence of drugs (T.1342). Appellant offered

no resistance when he was arrested in Mrs. Jackson's home. Mrs. Jackson said she had seen Linda Riley since the trial. Linda was not in custody (T.1345).

Mrs. Jackson identified appellant's art work and stated that appellant always sent her cards when he was in prison (T.1358).

Willie Jackson, appellant's father, worked for the government for 21 years before he was crippled with arthritis. He was confined to a wheelchair since approximately 1975. Etheria was more helpful to his father than his two brothers. He would bathe and groom his father. Mr. Jackson said he loved his son and would continue to visit him in prison (T.1359-1362).

Edith Davis is a family friend and neighbor of the Jacksons. She has known Etheria all her life. Appellant was always very kind to Ms. Davis and her 84 year old mother. He ran errands and cooked meals for them (T.1363-1365).

Toyetta Jackson has been confined to a wheelchair since she was six months old. Appellant was a good brother to her and never complained about bathing or caring for her. He was very good to his parents and children as well. Ms. Jackson loves her brother very much (T.1366-1368).

Mr. Jackson testified on his own behalf and told the jury that he wanted to live. He loves his parents and children and if given the chance to live he would try to be a positive influence in his children's lives (T.1372-1373).

On cross-examination, the prosecutor asked Mr. Jackson how many times he had been convicted of a felony. Appellant's objection was overruled, and appellant responded that he had been convicted of three felonies (T.1373-1374).

During the charge conference, the court agreed to instruct the jury on the aggravating factors under Sections 921.141(5)(a), (b), (d), (f),[1] (h), and (i),

[1]The court agreed, without objection, to instruct on Sections 921.141(5)(d) and (f) in the alternative to avoid any doubling of the two aggravating factors (T.1392-1398).

Florida Statutes, and the mitigating factors of age, under Section 921.141(6)(g), and any other aspect of the defendant's character and any other circumstances of the offense. The trial judge rejected appellant's requested instruction on lingering doubt and request to enumerate the non-statutory mitigation (T.1388-1418).

Appellant objected to the state using two charts listing the aggravating and mitigating circumstances in its closing argument on the ground that it would be misleading to the jury by suggesting that the weighing process was a counting process. The court allowed the state to use the charts, granting appellant leave to mark underneath them to counter the state's arguments (T.1429-1430).

Following the closing arguments (T.1430-1472), and instructions to the jury (T.1472-1478), a majority of the jury by a vote of seven to five recommended to the court that it impose the death penalty (R.704; T.1482-1483). The trial court sentenced appellant to death, finding five aggravating factors were present to wit: the murder was committd while the defendant was under sentence of imprisonment; the defendant was previously convicted of a violent felony; the murder was committed for financial gain; the murder was especially wicked, evil, atrocious or cruel; and the murder was committed in a cold, calculated and premeditated manner. The court found no statutory or non-statutory mitigating circumstances (R.733-738; T.1531-1534).

IV SUMMARY OF ARGUMENT

Appellant contends in Issue I that he is entitled to a new trial because of three errors which individually and in combination deprived him of the right to a fair and impartial jury. First, appellant sought to cross-examine the state's key witness regarding her bias, but the trial court restricted defense counsel's questions on the ground that evidence was irrelevant. Evidence tending to show bias of a witness is never irrelevant and the denial of effective cross-examination to impeach the credibility of a key witness is reversible error.

The court further erred in allowing the state to introduce irrelevant and highly prejudicial evidence reflecting an appellant's bad character. Two state witnesses testified that appellant had been in prison, although evidence of appellant's incarceration was not relevant to the issues at trial and appellant had not placed his character in issue. The state also introduced appellant's hearsay statements which were immaterial and irrelevant and served only to attack appellant's character. These errors compromised the fairness of the trial and a new trial is required.

In the penalty phase, appellant sought to introduce evidence that the parole commission does not consider inmates serving life sentences eligible for parole. Evidence that appellant may never be paroled must be considered as mitigating evidence, just as evidence of future dangerousness after parole may be considered in aggravation. The exclusion of this relevant mitigating evidence renders appellant's death sentence unconstitutional.

The admission of irrelevant and prejudicial evidence constituting non-statutory aggravating factors also renders the death sentence unconstitutional. In Issue III, appellant urges this Court to reverse the sentence and remand for a new jury recommendation because the state introduced evidence of appellant's conviction for escape, although the evidence was not necessary to prove the aggravating factor

under Section 921.141(5)(a), since the state had other less damaging evidence to establish this factor, and the evidence injected a totally improper consideration into the jury's weighing process.

In Issue IV, appellant requests a new penalty proceeding before a new jury because the state similarly placed before the jury the improper aggravating factor of significant history of prior criminal activity. Appellant testified in the penalty phase that he loved his parents and children and he wanted to live. Although appellant did not testify as to any substantive matters and did not place his credibility in issue, the court permitted the prosecutor to impeach appellant with the number of his prior convictions. This cross-examination was a transparent attempt to present affirmative evidence of non-statutory aggravation under the guise of impeachment and taints the jury's death recommendation.

In Issue V, appellant contends the court erred in refusing to give the jury specific instructions on non-statutory mitigating factors. Jury instructions must guide and focus the jury's consideration on the weight to be given mitigating evidence and the failure to give specific instructions denigrates the importance of the mitigation presented by the defense. Since proper instructions could make the difference in the jury's recommendation, a new penalty hearing before a new jury is necessary.

Finally, appellant urges that the court improperly found both aggravating circumstances of heinous, atrocious and cruel and cold, calculated and premeditated, since both factors were based on the same evidence and the same aspect of appellant's crime. At most, these factors constitute a single aggravating circumstance and one must be stricken.

V ARGUMENT

ISSUE I

APPELLANT WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION DUE TO THE COURT'S RESTRICTION OF DEFENSE COUNSEL'S CROSS-EXAMINATION OF A STATE WITNESS AND ADMISSION OF IRRELEVANT AND HIGHLY PREJUDICIAL EVIDENCE OF APPELLANT'S BAD CHARACTER.

A. THE TRIAL COURT ERRED IN RESTRICTING DEFENSE COUNSEL'S CROSS-EXAMINATION OF LINDA RILEY REGARDING HER BIAS.

The Sixth Amendment right to confrontation of witnesses requires that a defendant in a state criminal prosecution be allowed to impeach the credibility of a prosecution witness by cross-examination to show bias, interest or prejudice. Denial of effective cross-examination is constitutional error. Davis v. Alaska, 415 U.S. 308 (1974); Hannah v. State, 432 So.2d 631 (Fla. 3d DCA 1983). Bias or prejudice of a witness has an important bearing on his or her credibility and evidence tending to show such bias is always relevant. McDuffie v. State, 341 So.2d 840 (Fla. 2d DCA 1977); Webb v. State, 336 So.2d 416 (Fla. 2d DCA 1976). The right to elicit facts tending to show bias of a witness becomes even more important to a defendant in a murder case, such as this one, where a key state witness is being cross-examined. Yolman v. State, 469 So.2d 842 (Fla. 2d DCA 1985); Watts v. State, 450 So.2d 265 (Fla. 2d DCA 1984); Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980); McDuffie v. State, supra. See also, Coco v. State, 62 So.2d 892 (Fla.1953).

The state's case below was based chiefly on the testimony of Linda Riley, who was the only eyewitness to the crime. Ms. Riley testified on direct examination that after appellant's arrest, she stayed with his mother. She left Mrs. Jackson's house after appellant was indicted because Mrs. Jackson's attitude toward her changed and she felt uncomfortable there. Linda continued to visit appellant in

jail and took him money (T.609-611). The clear implication of this line of questioning was that Linda loved appellant but would not lie for him.

On cross-examination, appellant tried to refute this implication and impeach Ms. Riley with evidence that she had been dating another man while appellant was in jail and, in fact, got pregnant by another man while appellant was incarcerated awaiting trial. The court excluded this evidence, finding it irrelevant (T.665-673). This ruling was clearly wrong and deprived appellant of his right to fully cross-examine the witness to develop the issue of bias. Davis v. Alaska, supra.

In Davis v. Alaska, the trial court prohibited defense counsel from questioning Green, a key state witness, about his adjudication as a juvenile delinquent and probationary status. Relying upon the state's Juvenile Shield Law to justify excluding this testimony, the Alaska Supreme Court affirmed Davis' convictions. In reversing, the United States Supreme Court said:

> We cannot accept the Alaska Supreme Court's conclusion that the cross-examination that was permitted defense counsel was adequate to develop the issue of bias properly to the jury. While counsel was permitted to ask Green whether he was biased, counsel was unable to make a record from which to argue why Green might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial. On the basis of the limited cross-examination that was permitted, the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness or, as the prosecutor's objection put it, a "rehash" of prior cross-examination. On these facts it seems clear to us that to make any such inquiry effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

415 U.S. at 318 [Emphasis in original].

In McDuffie v. State, supra, the defendant's convictions for burglary and grand larceny were reversed because the trial court committed reversible error in restricting the defendant's cross-examination of the chief prosecution witness.

The witness, Guthrie, testified that he saw the defendant leaving the victim's home and carrying away the victim's personal property. On cross-examination, defense counsel was able to elicit that the defendant owed the witness money, but was not able to explore the issue further, or to inquire whether Guthrie had threatened to find a way to put the defendant in jail unless the defendant paid off the debt. The trial court ruled that such testimony would be improper as going beyond the scope of direct examination, and that defense counsel would have to establish these facts in his own case. The Second District reversed, finding that the testimony was relevant to show bias and to impeach the credibility of the witness. The court further found that the limitations on cross-examination were not harmless. The court reasoned:

> While the jury did learn that the defendant owed the witness some money, we think elaboration was essential, particularly in light of the alleged threat to send the defendant to jail.

341 So.2d at 841.

Here, appellant's counsel was able to impeach Linda Riley concerning her indebtedness (and motive for robbing Linton Moody), her special treatment for cooperating with the state, and inconsistencies in her testimony and statement to the police. However, appellant was not allowed to cross-examine her regarding her relationship with another man while appellant was in the county jail. This evidence was relevant to show her bias and motive for testifying against appellant. It was also relevant to impeach her testimony denying having an affair with Mr. Moody. Since the state was permitted to bring out on its direct examination that Linda was not having an affair with Mr. Moody while appellant was in prison, evidence that she was seeing someone else while appellant was in jail clearly bore on her credibility. The jurors, as the sole triers of fact and credibility, were entitled to hear this evidence.

The proffered cross-examination of Linda Riley was relevant and its exclusion was prejudicial. Appellant is thus entitled to a new trial.

B. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE THAT APPELLANT HAD BEEN IN PRISON.

The prejudicial effect in a criminal trial of evidence of a collateral crime committed by the defendant has long been recognized by this Court in decisions narrowly defining the circumstances in which such evidence may properly be allowed. State v. Harris, 356 So.2d 315 (Fla.1978); Williams v. State, 110 So.2d 654 (Fla.1959). Even evidence of a defendant's arrest for unrelated crimes has been recognized as so prejudicial as to compromise an accused's right to a fair and impartial jury. Wilding v. State, 427 So.2d 1069 (Fla. 2d DCA 1983); Marrero v. State, 343 So.2d 883 (Fla. 2d DCA 1977); Whitehead v. State, 279 So.2d 99 (Fla. 2d DCA 1973). Appellant's right to a fair and impartial jury was violated when the trial court permitted the state to introduce evidence at trial that appellant had been in prison.

Appellant sought to exclude the evidence of his prison stay on the grounds that it was irrelevant and would constitute an attack on his character. The state countered that the evidence was relevant to disprove the defense theory that Linda Riley was having an affair with Mr. Moody when appellant was in prison and she murdered him to end the relationship, since the state would prove that Ms. Riley did not meet Mr. Moody until appellant got out of prison (R.434; T.159-162). [The prosecutor later acknowledged that he could not prove when Ms. Riley met the victim, and the asserted relevancy grounds of the evidence proved groundless (T.426-427).] The court suggested that the state refer to dates as opposed to appellant's incarceration in presenting the evidence, but the state balked at the suggestion because "The unavailability notion is part of the affair" (T.162). The court took appellant's motion in limine under advisement (T.165), but later denied it (R.437; T.429).

The jury first heard that appellant was in prison during the state's opening argument (T.462). In the state's case in chief, the prosecutor asked Linda Riley if she ever had an affair with Mr. Moody. After getting a negative response, the prosecutor asked Ms. Riley when appellant got out of prison (T.588-589). Appellant's objection was overruled and motion for mistrial denied, the state promising to tie the offensive question to appellant's statement through Detective Warren (T.589-591). Ms. Riley then testified that she did not have an affair with Mr. Moody before December 1984 when appellant was released from prison (T.591-592).

In his direct testimony, Detective Warren repeated appellant's statement that Linda killed Mr. Moody because they "had had an affair while Mr. Jackson was in prison, and that Mr. Moody kept messing with Linda" (T.826).

The test for admissibility of evidence of prior crimes is one of relevancy. See Ruffin v. State, 397 So.2d 277, 279 (Fla.1981). The evidence that appellant was in prison one year before the murder of Linton Moody had absolutely no relevance to any issue at trial. Linda Riley denied having an affair with the victim and it did not matter whether the alleged affair occurred one year or one day before the murder, when appellant was in prison or in the next room. Appellant's statement to Detective Warren was discounted by Linda's denial of any relationship, and any further testimony that appellant had been in prison the previous year could serve no purpose but to portray appellant's bad character and propensity to commit crimes.

Clearly, the state is not permitted to attack a defendant's character unless he has first chosen to place his good character in issue. See, e.g., Perez v. State, 434 So.2d 347 (Fla. 3d DCA 1983); Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976); Jordan v. State, 171 So.2d 418 (Fla. 1st DCA 1965). The fact that the reference to appellant's prior incarcera-

tion was in the form of an admission by the defendant does not render the testimony relevant. See Jackson v. State, 451 So.2d 458 (Fla.1984); Dillman v. State, 411 So.2d 964 (Fla. 3d DCA 1982); Paul v. State, 340 So.2d 1249 (Fla. 3d DCA 1977).

In Bates v. State, 422 So.2d 1033 (Fla. 3d DCA 1982), a police officer testified that the victim had told him that the accused had stated to her that he had been in prison before. The court reversed indicating that the state may not impugn the character of an accused unless the accused first puts his character into issue at trial. The court held the defendant's mistrial motion should have been granted and indicated that the error was not cured by the trial judge's curative instruction.

The testimony presented here was relevant only to disparage appellant's character and to show propensity to commit crimes. The prejudicial impact of this improper testimony was exacerbated by the prosecutor's repeated references to it in his closing arguments (T.1086, 1103, 1168-1169, 1171). Appellant contends he is constitutionally entitled to a new trial because the erroneous admission of this prejudicial evidence denied him the right to a fair trial. Panzavecchia v. Wainwright, 658 F.2d 337 (5th Cir. 1981).

C. THE TRIAL COURT ERRED IN ADMITTING APPELLANT'S STATEMENTS TO DETECTIVE WARREN AT THE HOSPITAL.

Appellant moved in limine to prohibit the state from eliciting testimony about his statements to Detective Warren at the hospital on the grounds that the statements were hearsay and served no purpose but to attack appellant's character. The court denied the motion, finding that the statements were "definitely not admissions" (T.172), but nonetheless relevant (R.421-422, 426; T.168-172). At trial, Detective Warren testified, over appellant's objections (T.811-812), that appellant:

> was kind of kidding with me a little, and he was saying that after this case was over that me and him were going to be friends, and we were going to go out and have a drink, and so forth.
>
> * * *
>
> And he came back with, 'No, man, I'll go with my story, I can beat you, you can't prove this on me.'
>
> * * *
>
> A few minutes later he said that I'd have to catch him on the rebound, that I couldn't prove this on him.

(T.834-836).

The trial court correctly ruled that these statements were not admissions against interest, See Section 90.804(2)(c), Florida Statutes, but incorrectly held that they were relevant and thus admissible. Appellant did not testify at trial and his out-of-court statements were hearsay. Section 90.801(1)(c), Florida Statutes; Fagan v. State, 425 So.2d 1214 (Fla. 4th DCA 1983). Even if the statements were relevant, hearsay evidence is inadmissible. Section 90.802, Florida Statutes.

Moreover, the introduction of these statements could only serve to attack appellant's character and prejudice the jury against him. Owens v. State, 273 So.2d 788 (Fla. 4th DCA 1973); Jenkins v. State, 177 So.2d 756 (Fla. 3d DCA 1965). In Owens v. State, supra, the court reversed a conviction for second degree murder where a witness testified that he overheard a conversation in which the defendant said he turned down the state's offer to plead to a reduced charge because of his confidence in convincing the jury that the shooting was an accident. The court found the statement immaterial and irrelevant and intended to discredit the defendant's anticipated testimony. Similarly, in Jenkins v. State, supra, the state introduced testimony that the defendant, while in custody, offered to bet the officers $100 that he would not be convicted. In reversing the conviction, the court said:

> Even though these statements might have been voluntarily made, they were completely immaterial and irrelevant to the issue being tried, and would certainly have tended to besmirch the character and demeanor of the defendant, possibly prejudicing the trier of fact and could only have been introduced for this purpose, said statements being wholly irrelevant to the state's case.

177 So.2d at 757.

The statements introduced below were likewise irrelevant and prejudicial. While the introduction of these boasting statements alone might not warrant reversal, when considered in combination with the evidence that appellant had been in prison, which highlighted appellant's bad character, it becomes clear that appellant was denied his right to a fair trial. Albright v. State, 378 So.2d 1234 (Fla. 2d DCA 1979).

An accused is not entitled to an error free trial, but he must not be subjected to a trial with error compounded upon error. Perkins v. State, 349 So.2d 776 (Fla. 2d DCA 1977); Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977). Based upon the foregoing, appellant submits this Court must reverse his conviction and sentence and remand the cause for a new trial.

ISSUE II

THE TRIAL COURT ERRED IN EXCLUDING THE PROFFERED TESTIMONY OF HARRY DODD THAT A LIFE SENTENCE IS REGARDED BY THE PAROLE COMMISSION AS A LIFE SENTENCE WITHOUT POSSIBILITY OF PAROLE, THEREBY EXCLUDING RELEVANT MITIGATING EVIDENCE FROM THE JURY'S CONSIDERATION IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In Lockett v. Ohio, 438 U.S. 586, 604 (1978), the Supreme Court held that a state is constitutionally required to permit consideration of "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), established the corollary rule that the sentencer may not refuse to consider or be precluded from considering "any relevant mitigating evidence." See Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. ___, 90 L.Ed.2d 1, 6 (1986).

In a precursor to Lockett and Eddings, the Supreme Court declared that:

> a jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

Jurek v. Texas, 428 U.S. 262, 271 (1976). Consequently, the Court has held that a capital defendant's future dangerousness is a relevant consideration to aggravating circumstances, see California v. Ramos, 463 U.S. 992 (1983); likewise, evidence that the defendant would not pose a danger if spared, but incarcerated, must be considered potentially mitigating. Skipper v. South Carolina, supra.

In California v. Ramos, supra, the Supreme Court held that California's "Briggs Instruction," which informed the jury of the governor's power to commute a life sentence without possibility of parole to a lesser sentence which would include the possibility of parole, was both constitutionally permissible and relevant sentencing decision:

> By bringing to the jury's attention the possibility that the defendant may be returned to society, the Briggs Instruction invites the jury to assess whether the defendant is someone whose probable future behavior makes it undesirable that he be permitted to return to society.

463 U.S. at 1003. The Court found "unpersuasive" the suggestion that the possible commutation of a life sentence was too speculative for the jury's consideration. Id., at 1001.

The instruction in Ramos focused not on any aspect of the defendant's character or circumstances of the offense, but on the remote actions of the governor. The Court noted that the essential effect of the California instruction on the governor's power to commute a life sentence was "to inject into the sentencing calculus a consideration akin to the aggravating factor of future dangerousness," 463 U.S. at 1008. Conversely, the lack of future dangerousness due to parole ineligibility must be a constitutionally permissible and relevant consideration for the jury. As noted by Justice Marshall in his dissent from the denial of certiorari in Eutzy v. Florida, __U.S.__, 85 L.Ed.2d 336, 338 (1985):

> Given the future dangerous after a distant parole or pardon has been considered relevant to aggravation, it must certainly be considered relevant to mitigation. As I said in Patterson [v. South Carolina], 'A system of punishment would certainly be fundamentally unfair if it accepted the validity of a call for death where a factor was present, but declared that that factor's absence could not be offered as a reason for life. Such situation cannot be tolerated by the Eighth Amendment.'

See O'Connell v. State, 480 So.2d 1284, 1287 (Fla.1985) (Double standard in denying defense counsel opportunity to examine two jurors while permitting state to question jurors individually and even re-examine them after defense counsel had exercised challenges for cause amounted to a violation of due process).

At trial, Appellant sought to preclude the state from advising the jury that, if given a life sentence, appellant would be eligible for parole in 25 years. Appellant argued that because the Parole Commission adhered to the position

that there is no longer any parole for inmates serving life sentences, advising the jury of the possibility of parole in 25 years would be misleading. Furthermore, if jurors were advised of the parole possibility (which might not exist), they might be more inclined to recommend death (R.125-126; T.141-144). Appellant supported his motion in limine concerning penalty with an affidavit by Harry T. Dodd, Parole Services Director for the Florida Parole and Probation Commission stating:

> It is the Commission's position that any person having committed any crime on or after October 1, 1983, is not eligible for consideration for parole. This position taken by the Commission is based upon the conclusion found in the opinion of the Attorney General of the State of Florida rendered January 20, 1984, numbered 84-5. In addition, the Commission relies upon the language found in F.S. 921.001(8).[2]

(R.127). The trial court denied appellant's motion in limine, finding that the parole commission's position was "more political in nature than really stating a legal opinion" (T.145-146).

Prior to the penalty phase appellant requested either that the court advise the jury on life in prison without parole, per Mr. Dodd's affidavit, or permit the defense to present Mr. Dodd's testimony in the penalty phase proceeding (R.659-660). This motion was likewise denied (T.1215-1216).

Appellant did not argue below, nor does appellant maintain here, that there is no parole for a sentence of life imprisonment as a matter of law; rather, appellant sought to advise the jury as a factual matter that the Director of

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[2]Section 921.001(8), provides:

> A person convicted of crimes committed on or after October 1, 1983, or any other person sentenced pursuant to sentencing guidelines adopted under this section shall be released from incarceration only:
>
> (a) Upon expiration of his sentence;
>
> (b) Upon expiration of his sentence as reduced by accumulated gain time; or
>
> (c) As directed by an executive order granting clemency.

the Parole Commission, a state official responsible for implementing the parole statute, maintained that there was no longer parole eligibility. Appellant contends that the trial court's refusal to allow appellant to present the testimony of the parole director violates the established principle that a jury must be permitted to consider any and all possible mitigating factors. Eddings v. Oklahoma, supra; Lockett v. Ohio, supra.

This Court has consistently condemned prosecutorial arguments which infer that if a death sentence is not imposed, the defendant may escape or be paroled and kill again. See generally, Teffeteller v. State, 439 So.2d 840 (Fla.1983); Grant v. State, 194 So.2d 612 (Fla.1967); Singer v. State, 109 So.2d 7 (Fla.1959). Even without such explicit arguments, consideration of a defendant's future dangerousness is a common inquiry.[3] When making such inquiry,

> What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.

Jurek v. Texas, 428 U.S. 262, 276 (1976).

In Skipper v. South Carolina, supra, the Court ruled that evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating.

> Under Eddings, such evidence may not be excluded from the sentencer's consideration.

Skipper v. South Carolina, supra, 90 L.Ed2d at 7. Accord, Valle v. State, 12 FLW 51 (Fla. January 5, 1987). Evidence that a defendant may never be eligible for parole if given a life sentence must likewise be considered potentially mitigating, and "Lockett requires the sentencer to listen." Eddings v. Oklahoma, 455 U.S. at 115 n.10.

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[3] See California v. Ramos, 463 U.S. 992, 1016 (1983) (Marshall, J., dissenting), noting that other state courts have recognized that juries will compensate for the possibility of future clemency by imposing harsher sentences.

Skipper further recognized that:

> The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison.

90 L.Ed.2d at 7 n.1.

Similarly, here, the relevance of the proffered evidence was underscored when the jury was advised that appellant had a prior conviction for escape (see Issue III, infra) and was on parole at the time of the commission of the instant offense. As the Skipper Court acknowledged:

> Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett and Eddings that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' Gardner v. Florida, 430 U.S. 349, 362, 51 L.Ed.2d 393, 97 S.Ct. 1197 (1977).

Id. The prosecutor below did not need to urge the jury to return a death recommendation because of appellant's prior escape and parole status; the jury could easily have come to that conclusion on its own. Appellant was deprived the opportunity to rebut that inference, contrary to the Eighth and Fourteenth Amendments, by informing the jury that he may never again be on parole.

Although the advisory jury under Florida's sentencing scheme has a statutory responsibility to weigh aggravating factors against mitigating factors and recommend death only if the former outweigh the latter, Section 921.141(2), Florida Statutes, the Constitution does not require the jury to ignore other possible factors to determine whether death is the appropriate punishment. California v. Ramos, supra. In fact, the Constitution requires the jury to consider all factors which call for a sentence less than death. Advising the jury that the parole

commission regards a life sentence as exactly that, a life sentence without possibility of parole, places before the jury an additional element to be considered in weighing the proper penalty.

In Valle v. State, 12 FLW 51 (Fla. January 5, 1987), this Court reversed a death sentence and remanded for a new jury recommendation where the trial court excluded evidence of the defendant's good conduct in prison, reasoning:

> The jury's recommended sentence is given great weight under our bifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such a recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recomendation of death, the defendant is entitled to a new jury recommendation on resentencing.

12 FLW at 51-52.

The erroneous exclusion of evidence here likewise compels a remand for a new jury recommendation, since this Court cannot determine what effect the mitigating evidence would have on the jury's seven to five death recommendation.

ISSUE III

THE TRIAL COURT ERRED IN PERMITTING THE STATE TO INTRODUCE EVIDENCE OF APPELLANT'S CONVICTION FOR ESCAPE, WHERE SUCH EVIDENCE WAS NOT NECESSARY TO PROVE AN AGGRAVATING CIRCUMSTANCE AND CONSTITUTED NON-STATUTORY AGGRAVATION.

In order to prove the aggravating circumstance under Section 921.141(5)(a), Florida Statutes, that the capital felony was committed by a person under sentence of imprisonment, the state introduced evidence establishing that appellant was on parole for the crimes of armed robbery and escape on the date Linton Moody was murdered. In fact, the state's entire presentation at the penalty phase was geared toward proof of these two crimes. The records custodian of the Circuit Court identified the judgments and sentences; the fingerprint examiner identified appellant's fingerprints on the judgments and sentences; the DOC administrator certified appellant's release on parole, and the parole supervisor verified that appellant was on parole on the critical date.

Prior to the penalty phase hearing, appellant moved in limine to prohibit the state from revealing the nature of the escape conviction and offered to stipulate that appellant was on parole. Appellant argued that evidence of his conviction for escape was not necessary to prove the aggravating factor, since his status as a parolee was relevant, not the crime for which he was on parole, and since appellant was on parole for both escape and armed robbery. Appellant contended that evidence of the escape conviction would be unduly prejudicial and constitute a non-statutory aggravating circumstance in that the jury would be more inclined to recommend death knowing that appellant was on parole for escape. The motion was denied (R.694-695, 696; T.1231-1239). Appellant contends that the evidence of his conviction for escape was not necessary to prove the aggravating factor and that its probative value was substantially outweighed by its prejudicial effect, thereby rendering appellant's death sentence unconstitutional.

The state's evidence bore out the fact that appellant was on parole for both armed robbery and escape. The affidavit of the DOC administrator confirmed that appellant was paroled on December 4, 1984, while serving a cumulative sentence for both offenses. Since appellant was on parole for the armed robbery conviction, there was absolutely no reason to prove that he was also on parole for escape. Evidence of the robbery conviction was indisputably admissible to prove the aggravating circumstance under Section 921.141(5)(b); since the same conviction could be used to support the aggravating factor under Section 921.141(5)(a), there was no legitimate purpose in advising the jury that appellant was on parole for an additional, otherwise inadmissible, offense. The illegitimate purposes of such evidence were to inform the jurors of appellant's history of prior criminal activity, Mikenas v. State, 367 So.2d 606 (Fla.1978), and to suggest that death was the appropriate penalty because appellant had previously escaped from custody. See Issue IV, infra. The rub here is not that the jury learned that appellant was on parole at the time of the murder, but that the jury learned of the nature of an offense which was irrelevant, inadmissible and highly prejudicial.

Assuming arguendo, but not conceding, that the escape conviction was necessary to prove that appellant was under sentence of imprisonment in December 1985, there was no need to prove the nature of the offense for which he was on parole. While the fact of appellant's parole status was necessary to establish the aggravating circumstance, the nature of the conviction had absolutely no probative value. The state thus had a duty to minimize the prejudicial effect of its proof. As noted by one court:

> Where the prosecutor has shown an actual need for evidence of other crimes, trial judges should in circumstances such as we encounter here take care to minimize the potential for prejudice by excluding evidence of the nature of the felony altogether, or by inquiring as to the existence of a different, less provocative offense.

United States v. Cook, 538 F.2d 1000, 1005 (3d Cir. 1976). The prejudice here could easily be minimized by a stipulation in which the jury would be told that appellant had been convicted of an offense in 1982 and released on parole in 1984.

In Parker v. State, 408 So.2d 1037 (Fla.1982), this Court held that in a prosecution for possession of a firearm by a convicted felon, the state is not required to accept a stipulation to a prior felony conviction, but rather may introduce into evidence the judgment and sentence to establish the prior conviction. However, the Court recognized that under certain circumstances, not present in Parker, proof of conviction is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless presentation of cumulative evidence.

Parker recognized that the admissibility of a prior felony conviction must be reconciled with the limitations prescribed in Section 90.403, Florida Statutes. Subsequent to Parker, this Court held, in State v. Williams, 444 So.2d 13 (Fla.1984), that the state need only prove the defendant was in custody as opposed to lawful custody at the time of his purported escape since the defendant would undoubtedly be prejudiced by proof of the nature of his arrest. In State v. Vazquez, 419 So.2d 1088 (Fla.1982), this Court reversed convictions of first degree murder and unlawful display of a firearm during the commission of a felony because the trial court refused to sever a count charging unlawful possession of a firearm by a convicted felon. The Court expressed particular concern that the jury's verdict may have been influenced by the evidence revealing that the defendant had been adjudicated guilty of offenses unrelated to those for which he was then on trial. Without expressly referring to Section 90.403, these cases acknowledge the principle that even relevant evidence is inadmissible if its probative value is substantially outweighed by its prejudicial effect.

Section 90.403, Florida Statutes, provides:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence.

As noted in Westley v. State, 416 So.2d 18 (Fla. 1st DCA 1982), unfair prejudice means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. The danger of unfair prejudice was uncommonly present here since the jury was likely to use the fact of appellant's conviction for escape, rather than the fact that he was on parole, as aggravation to support the death penalty. This danger was brought home by the prosecutor's closing argument in the penalty phase.

The prosecutor did not merely argue to the jury that appellant was on parole at the time of the murder; he repeatedly reminded the jury that appellant was on parole for escape, as if the escape conviction were the aggravating factor. See T.1438: "[T]he man who did this was on parole for escape. . .. He was on parole for escape."; T.1441: "[T]he defendant was convicted of escape, and was under a sentence of imprisonment for escape at the time Linton Moody entered his residence."; T.1442: "This defendant, with his armed robbery conviction, and being on parole for escape and armed robbery"; T.1452: "This defendant was on parole for escape at the time of the murder." In fact, the state attorney never once mentioned that appellant was on parole or under sentence of imprisonment without referring to the escape conviction, and only once did he mention the robbery conviction. The evidence of appellant's conviction for escape and the prosecutor's arguments were violative of the Eighth Amendment in their exhortation to the jury to impose death based on an entirely improper consideration.

In Arrington v. State, 233 So.2d 634, 637 (Fla.1970), this Court held that while the state is not required to accept a stipulation,

> This is not to say that there can be no check on the prosecution's procession of evidence. The submission of evidence remains subject to the safeguard of objections raised on traditional grounds. The question then is not whether a stipulation should be accepted, but rather whether or not the presentation of evidence would violate standards of relevancy and materiality and the like and whether it would be merely cumulative or inflammatory. Thus while a court cannot force acceptance of an offer to stipulate upon the declining party absent proof of prior acceptance or acquiescence, the court can entertain objections to submission of evidence which are based upon traditional grounds.

Even if proof of a prior conviction is admissible despite an offer to stipulate, Parker v. State, supra, there must be a balancing between the probative value of the evidence and its potential prejudice to the accused. There clearly was no need to introduce appellant's escape conviction below and its probative value was substantially outweighed by unfair prejudice, confusion of the issues and needless presentation of cumulative evidence. On balance, the evidence should have been excluded.

The error in introducing appellant's conviction for escape cannot be deemed harmless. The aggravating circumstances specified in the statute are exclusive. Miller v. State, 373 So.2d 882 (Fla.1979). Evidence offered by the state for the purpose of aggravating the crime is inadmissible unless it tends to establish one of the aggravating factors listed in Section 921.141(5), Florida Statutes (1985). See, e.g., Provence v. State, 337 So.2d 783 (Fla.1976); Perry v. State, 395 So.2d 170 (Fla.1981); Odom v. State, 403 So.2d 936 (Fla.1981). The inclusion of a nonstatutory aggravating factor infects the jury's weighing process and taints their death recommendation. Maggard v. State, 399 So.2d 973 (Fla.1981). As this Court stated in Ellege v. State, 346 So.2d 998, 1003 (Fla.1977):

> We must guard against any unauthorized factor going into the equation which might tip the scales of the weighing process in favor of death.

At least five of the jurors in this case believed that life was the appropriate penalty based upon the mitigating evidence proffered by appellant. Even if

the trial judge found numerous aggravating circumstances and nothing in mitigation, appellant is entitled to a new jury recommendation since this Court cannot determine beyond a reasonable doubt whether the improper evidence made the one vote difference between a recommendation of life imprisonment or death. See Valle v. State, 12 FLW 51 (Fla. January 5, 1987) (Court cannot say beyond a reasonable doubt whether erroneous exclusion of relevant mitigating evidence affected jury's recommendation of death); Tafero v. State, 406 So.2d 89, 95n.13 (Fla. 3d DCA 1981) (Where challenge is to the admission of evidence of aggravating factors or to the exclusion of evidence of mitigating factors, the existence of other aggravating circumstances does not obviate the need for a further jury recommendation). This Court must therefore reverse appellant's sentence and remand the cause for a new penalty trial before a new jury.

ISSUE IV

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO CROSS-EXAMINE APPELLANT ABOUT PRIOR CONVICTIONS IN THE PENALTY PHASE, SINCE APPELLANT'S CREDIBILITY WAS NOT IN ISSUE AND THE EVIDENCE OF APPELLANT'S PRIOR CRIMINAL RECORD CONSTITUTED IMPERMISSIBLE NON-STATUTORY AGGRAVATION.

Prior to trial appellant filed a motion to prohibit impeachment by prior criminal convictions at either the guilt or penalty phases of the trial. Appellant specifically argued that, since he waived the mitigating circumstance of no significant history of prior criminal activity, evidence of his prior convictions would be inadmissible unless to prove that appellant was under sentence of imprisonment or had been previously convicted of a felony involving the use or threat of violence (R.422-423). The motion was denied (R.427). However, the state did not oppose appellant's notice of waiver of the mitigating circumstance under Section 921.141 (6)(a) and motion in limine (R.100) in the pre-penalty phase hearing (T.1216-1218, 1224), and this motion was granted (R.666). Nonetheless, the state, over appellant's objections, was permitted to cross-examine appellant regarding his prior convictions, thereby infecting the jury with the knowledge of an additional felony conviction.

The prosecutor justified its cross-examination ostensibly for the purpose of attacking appellant's credibility. Cross-examination is intended to bear on a witness' credibility vis-a-vis the testimony on direct examination. Since appellant's direct testimony was strictly limited to the following questions and answers:

Q. Let me ask you this, Mr. Jackson: Do you want to live?
A. Yes, I do.
Q. Do you love your mom and dad?
A. Yes, I do.
Q. Do you love your children?
A. Yes.
Q. Mr. Jackson, if you spend the rest of your life in prison, will you do your best to be a positive influence in the lives of your children?

A. Yes, I will, I always have been.

(T.1372-1373), the question, "How many times have you been convicted of a felony?" (T.1373), could hardly bear on appellant's credibility in his testimony on direct. The cross-examination was not only beyond the scope of the direct examination, but was intended for the illicit purpose of attacking appellant's character in the penalty phase.

There was an important tactical reason for appellant's counsel to deliberately limit the scope of the direct examination of appellant in the penalty phase. A defendant may not be precluded from offering as mitigation any aspect of his character, whether it relates to a statutorily enumerated mitigating circumstance or not. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Perry v. State, 395 So.2d 170 (Fla.1980). Appellant offered as mitigation his desire to live, much in the nature of allocution before imposition of sentence. The state had already introduced appellant's two felony convictions for escape and armed robbery, and there certainly was no reason for appellant's counsel to encourage the state to cross-examine Mr. Jackson regarding additional criminal activity. Thus, counsel specifically limited his direct examination of Mr. Jackson and did not make any inquiries into factual or substantive matters which would place appellant's credibility in issue.

Ordinarily, a defendant who takes the stand as a witness in his own behalf occupies the same status as any other witness and is subject to cross-examination as other witnesses. See Fla.R.Crim.P. 3.250; See also, Randolph v. State, 463 So.2d 186 (Fla.1984); Booker v. State, 397 So.2d 910 (Fla.1981). In Booker, the Court held that it was appropriate for the prosecutor to cross-examine the defendant in the penalty phase concerning his previous criminal activity to negate the mitigating factor of no significant history. There are limits, however, to

which cross-examination can be pursued in the penalty phase of a trial. Cross-examination of the defendant cannot go beyond the subject matter covered on his direct testimony, State v. Dixon, 283 So.2d 1 (Fla.1973), rebut a mitigating circumstance expressly waived by the defense, Maggard v. State, 399 So.2d 973 (Fla.1981), or extend to matters concerning possible aggravating circumstances. State v. Dixon, supra. In State v. Dixon, this Court recognized:

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factor, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla.Const., art. I, Section 9, F.S.A., and U.S. Const. Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

283 So.2d at 7-8 [Emphasis added.]

The prosecutor's cross-examination here violated each of these protected areas. Appellant did not open the door to inquiry into his criminal past by testifying that he loved his mother and father and four children. Cf. Magill v. State, 386 So.2d 1188 (Fla.1980) (defendant's testimony on direct examination as to his mental state before murder opened door for prosecutor to cross-examine him regarding mental attitude during and for a reasonable time after commission of the crime). Furthermore, by inquiring into the number of appellant's felony convictions, the state was presenting affirmative evidence of non-statutory aggravation under the guise of impeachment.

Evidence of a defendant's prior criminal activity is not admissible in a penalty phase to show a defendant's bad character, unless the evidence is relevant to a statutory aggravating circumstance (e.g. prior violent felonies which have

resulted in convictions) or to rebut the mitigating circumstance (if such is at issue) that the defendant has no significant history of criminal activity. Dragovich v. State, 492 So.2d 350 (Fla.1986); Odom v. State, 403 So.2d 936 (Fla.1981); Maggard v. State, supra.

In Maggard v. State, this Court reversed a death sentence and ordered a new sentencing hearing where the state presented extensive evidence of Maggard's prior criminal record of nonviolent offenses to rebut the mitigating factor of no significant prior criminal activity, after Maggard expressly waived reliance on that factor. As in the instant case, Maggard moved prior to the sentencing hearing to exclude this evidence of nonviolent crimes. The trial court denied Maggard's motion. This Court held that the trial court's ruling, and the subsequent introduction of the challenged evidence, was prejudicial and reversible error.

The trial court below granted appellant's unopposed motion in limine to preclude evidence of his prior criminal activity, yet the state managed to get it in through the back door on its cross-examination of appellant. At the motion hearing, the state acknowledged that "[S]ince they are waiving that [Section 921.141(6)(a)], they are putting us on notice not to introduce that, and I accept that" (T.1224). The state's cross-examination was a blatant violation of the court's prior ruling and its pledge not to introduce the extraneous criminal record.

Mitigating factors are for the defendant's benefit, and the state should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance not relied upon by the defense. Maggard v. State, supra, at 978. If the state cannot directly present evidence of a defendant's criminal activity, which is not relevant to establish an aggravating factor or rebut a mitigating factor, it should not be permitted to do so under the guise of impeachment. As stated in Dragovich v. State, supra at 355:

> Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the result of such evidence being employed will be the same: improper considerations will enter into the weighing process. The state may not do indirectly that which we have held they may not do directly.

Where evidence of improper aggravating factors has been placed before the jury, a new sentencing hearing is required. See Maggard v. State, supra at 977 (Error was held to be "of such magnitude as to require a new sentencing hearing before the jury and the court.") See also, Perry v. State, supra at 174-175 (Death sentence reversed and case remanded for new penalty proceeding before a new jury because the state presented evidence of non-statutory aggravating circumstances). Appellant's sentence must therefore be reversed and the cause remanded for a new penalty proceeding before a new jury.

ISSUE V

THE TRIAL COURT ERRED IN REFUSING TO GIVE THE JURY SPECIFIC INSTRUCTIONS AS TO THE NON-STATUTORY MITIGATING CIRCUMSTANCES IT COULD CONSIDER.

The penalty phase testimony of appellant, his parents, sisters and friends was an effort to persuade the jury to recommend a life sentence rather than the death penalty. In order to guide the jury in its consideration of the non-statutory mitigation presented, defense counsel submitted a written list of non-statutory mitigating circumstances which would be supported by the evidence, and requested the court to instruct the jury accordingly (R.700-701; T.1412-1416). The trial court refused to give any instructions on specific non-statutory mitigating circumstnaces (T.1417-1418), and instead, instructed the jury as follows:

> Among the mitigating circumstances you may consider, if established by the evidence, are the age of the defendant at the time of the crime, and any other aspect of the defendant's character or record, or any other circumstance of the offense.

(T.1474-1475).

Although the jury was instructed on the "catch-all" reference to non-statutory mitigating circumstances, appellant avers that such instruction is totally inadequate to suitably guide and focus the jury's consideration on the independent weight to be given to the mitigating evidence. The jury cannot be presumed to give full consideration to mitigating circumstances unless it is informed of its ability to do so.[2] Jury instructions are an indispensable tool for ensuring that the jury understands and considers the legal effect of the evidence it has heard.

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[2]The inability of the jury to give full consideration to the proffered mitigating circumstances was exacerbated by the state's use, over appellant's objection (T.1429), of two charts listing five aggravating factors and two mitigating factors (age and any other aspect). The charts and the prosecutor's repeated references to only "two" mitigating factors denigrated the importance of the non-statutory mitigation presented by the defense and implied that the jury was engaged in a counting and not a weighing process (T.1435, 1447, 1448, 1451).

In Gregg v. Georgia, 428 U.S. 153, 192-193 (1976), the Supreme Court emphasized the constitutional necessity of clear jury instructions in capital cases so that:

> the jury is given guidance regarding the factors about the crime and the defendant that the state, . . ., deems particularly relevant to the sentencing decision.
>
> * * *
>
> It is simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations.

In Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), the court noted that jury instructions must "describe the nature and function of mitigating circumstances" and

> communicate to the jury that the law recognizes the existence of facts or circumstances which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence.

661 F.2d at 472 (footnote omitted). Accord, Westbrook v. Zant, 704 F.2d 1487, 1503 (11th Cir. 1983). The Spivey court went on to hold:

> [T]he eighth and fourteenth amendments require that when a jury is charged with the decision whether to impose the death penalty, the jury must receive clear instructions which not only do not preclude consideration of mitigating factors, Lockett, but which also "guid[e] and focu[s] the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender. . ." Jurek v. Texas, 428 U.S. at 274, 96 S.Ct. at 2957.

661 F.2d at 471.

When incomplete jury instructions reduce the importance of any proffered mitigating circumstances, it unconstitutionally precludes those factors from receiving full and effective consideration by the jury. State v. Johnson, 257 S.E.2d 597 (1979). In State v. Johnson, the Supreme Court of North Carolina held that, when properly requested to do so, the trial court must instruct the jury on specific non-statutory mitigating circumstances:

> If, . . ., a defendant makes a timely request for a listing in writing of possible mitigating circumstances, supported by the evidence, and if these circumstances are such that the jury could reasonably deem them to have mitigating value, we are of the opinion that the trial judge must put such circumstances on the written list.
>
> The legislature did not intend to give those mitigating circumstances expressly mentioned in the statute primacy over others which might be included in the "any other circumstance" provision. Such an intent, if it existed, might run afoul of Lockett v. Ohio, supra, 438 U.S. 586, 98 S.Ct. 2954, 5f L.Ed.2d 973.
>
> * * *
>
> Under Lockett a legislature would be free to provide that the existence of certain mitigating factors would preclude the imposition of the death penalty, while the existence of others should simply be considered, but not as controlling, on the question. A death penalty sentencing statute, however, which by its terms or the manner in which it is applied, puts some mitigating circumstances in writing and leaves others to the jury's recollection might be constitutionally impermissible under the reasoning of Lockett. For if the sentencing authority cannot be precluded from considering any relevant mitigating circumstance supported by the evidence neither should such circumstances be submitted to it in a manner which makes some seemingly less worthy of consideration than others.

257 S.E.2d at 616-617 [Emphasis added.]

For the reasons expressed in State v. Johnson, supra, appellant submits that the trial court's refusal to instruct the jury on specific non-statutory mitigating factors was error of constitutional dimension. While it is impossible to determine whether proper instructions would tip the balance of the seven to five death recommendation in favor of life, it is clear that the weighing process was fatally flawed by this impropriety. Appellant's death sentence must be reversed and the case remanded for a new penalty hearing.

ISSUE VI

APPELLANT'S DEATH SENTENCE IS UNCONSTITUTIONAL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE IT IS FOUNDED UPON AN IMPROPER DOUBLING OF AGGRAVATING CIRCUMSTANCES.

In the seminal case of Provence v. State, 337 So.2d 783 (Fla.1976), cert. denied, 431 U.S. 969 (1977), this Court recognized the impropriety of relying on two aggravating circumstances both based on the same evidence and the same aspect of the defendant's crime. Provence involved a robbery-murder and consideration of two aggravating circumstances, that the murder occurred in the commission of the robbery and that the crime was committed for pecuniary gain. In disallowing the doubling of these two factors, this Court stated:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged. Mindful that our decisions in death penalty cases must result from more than a simple summing of aggravating and mitigating circumstances, State v. Dixon, 283 So.2d 1, 10 (Fla.1973), we believe that Provence's pecuniary motive at the time of the murder constitutes only one factor which we must consider in this case.

337 So.2d at 786 (emphasis in original). Accord, Oats v. State, 446 So.2d 90 (Fla.1984).

The trial court's findings regarding the aggravating circumstances of heinous, atrocious and cruel, and cold, calculated and premeditated are identical and constitute impermissible doubling under the Provence standard. At most, these factors constitute a single aggravating circumstance.

It is obvious that the prosecutor during the penalty phase proceeding was relying on the same aspect of the crime to prove the aggravating factors under Sections 921.141(5)(h) and (i), Florida Statutes. Relying solely on the evidence presented at trial, the prosecutor urged the jury to find both aggravating circumstances based on the facts that the victim was 64 years old; had breathing problems; was helpless with his hands tied; begged for his life, aware of his impending death; was gagged, choked and repeatedly stabbed (T.1436-1439, 1445-1446). After detailing the facts supporting the heinous, atrocious and cruel factor, the prosecutor asked the jury to "Look back" (T.144) at the very same evidence to find that the crime was committed in a cold, calculated and premeditated manner. The prosecutor reiterated that the factual basis for the two factors was the same when he argued, "It's heinous, yes, but it's calculated" (T.1446).

The trial court's findings regarding these two aggravating circumstances likewise depend upon the same aspects of the crime (R.737-738; T.1532-1533). With regard to the finding that the crime was committed in a cold, calculated and premeditated murder, the court made the additional finding that appellant's behavior after the murder exhibited a "cold, ruthless, and calculating attitude" (R.738).

While a trial court may consider both these aggravating factors together, the court's findings must contain sufficient, distinct proof as to each factor. Mills v. State, 462 So.2d 1075, 1081 (Fla.1985); Hill v. State, 422 So.2d 816, 819 (Fla.1982). Since both aggravating circumstances here are based on the identical evidence, they must be considered cumulative, and one must be stricken.

CONCLUSION

Based upon the foregoing argument, reasoning and citation of authority in Issue I, appellant requests that his conviction be reversed and the cause remanded for a new trial. For the reasons set forth in Issues II, III, IV, V and VI, appellant requests this Court vacate his death sentence and remand the cause for a new sentencing hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Assistant Attorney General Ray Marky, The Capitol, Tallahassee, FL, 32301, this 13th day of February, 1987.

Paula S. Saunders
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